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Jelai Holdings Sdn Bhd v Perbadanan Setiausaha Kerajaan Pahang and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS C-02–2519–11 OF 2013 AND C-02–2520–11 OF 2013
ABDUL WAHAB PATAIL, ZAHARAH IBRAHIM AND DAVID WONG JJCA
4 JUNE 2014

Contract — Construction — Evidence on factual matrix — Whether that part of agreements under which appellant took over running of respondent's hotels subject to fixed monthly payment constituted agreement for tenancy — Whether fixed monthly payments were rentals — Whether appellant's failure to deliver up vacant possession of hotels on termination of agreements made it liable to pay double-rental for holding over — Civil Law Act 1956 s 28(4)(a)

The respondent ('PSKP') had filed two suits against the appellant ('Jelai') in the High Court for rentals owing in respect of two of its hotels — one at Fraser's Hill, Raub and the other at Muara Beach, Balok — which Jelai were required to upgrade, maintain, manage and operate pursuant to two agreements. Under the agreements, Jelai was required to pay PSKP rental of RM4,000 per month but when it defaulted in doing so, PKSP terminated the agreements and then filed the suits. In each case, Jelai disputed the claim and filed a counterclaim. In respect of the Fraser's Hill hotel, Jelai pleaded that part of the claim was time barred under s 6(1)(a) of the Limitation Act 1953 and also that the claim should be set-off against monies Jelai had expended for improvement works to the hotel. In respect of the Balok hotel, the counterclaim was only for monies expended for improvement works. The High Court allowed PSKP's claims in both suits and dismissed the counterclaims. In the instant appeal against the decision, the appellant argued, inter alia, that the agreements were not tenancy agreements simpliciter; that the monthly RM4,000 payments were not rentals and that consequently Jelai could not be penalised with double rental payments under s 28(4)(a) of the Civil Law Act 1956 ('the Act').

Held:

(1) It was evident that the respective agreements for the hotels were composite agreements combining on the one hand, a tenancy of the hotels, and on the other, the upgrading, maintenance, management and operation of the hotels paid for from rentals received from hotel guests. The monthly payment of RM4,000 to PSKP was unquestionably a monthly rental of the hotels and under the agreements it was not a sum

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which could be withheld against any payment claimed as due from PSKP. The failure to pay the rental entitled PSKP to terminate the agreements (see paras 15–17).

(2) The conclusion that the monthly payments were rental payments in a tenancy component of the respective agreements led inevitably to the conclusion that the termination of the agreements by PSKP was lawful and that Jelai's failure to deliver up vacant possession resulted in the coming into operation of s 28(4)(a) of the Act entitling PSKP to claim double rental for holding over (see para 18).

(3) As RM72,000 of the total claim for unpaid rental was clearly time barred, that sum had to be deducted from the sum awarded by the High Court. The appeal against the dismissal of Jelai's counterclaim failed as the contention that the rentals were withheld to be set-off against costs of repair and maintenance was not only not pleaded but contradicted the terms of the respective agreements that Jelai should pay for costs of repairs, maintenance, management and operations. PSKP was only required to pay for costs above RM20,000 which it had approved but there was no evidence to show that there was any such proposal made, approval given and subsequent claim made at the time they were incurred, and accounted for as a set-off against the monthly rentals. The counterclaim in respect of Appeal No 2520 was time barred (see paras 20 & 22–24).

[Bahasa Malaysia summary

Responden ('PSKP') telah memfailkan dua tindakan terhadap perayu ('Jelai') di Mahkamah Tinggi untuk sewa yang dihutang berkaitan dua daripada hotelnya — satu di Bukit Fraser, Raub dan satu lagi di Muara Beach, Balok — yang mana Jelai dikehendaki untuk meningkatkan, mengekalkan, mengurus dan beroperasi berikutan kepada dua perjanjian. Di bawah perjanjian-perjanjian tersebut, Jelai dikehendaki membayar kepada PSKP sewa sebanyak RM4,000 sebulan tetapi apabila ia mengingkari dalam berbuat sedemikian, kepada PKSP menamatkan perjanjian-perjanjian tersebut dan kemudiannya memfailkan tindakan tersebut. Dalam setiap kes, Jelai mempertikaikan tuntutan dan memfailkan tuntutan balas. Berkaitan hotel di Bukit Fraser, Jelai memplid bahawa sebahagian daripada tuntutan dihalang masa di bawah s 6(1)(a) Akta Had Masa 1953 dan juga bahawa tuntutan tersebut di tolak melalui wang yang Jelai telah belanjakan untuk kerja pembaikan hotel tersebut. Berkaitan hotel Balok, tuntutan balas tersebut hanya untuk wang dibelanjakan untuk kerja-kerja pembaikan. Mahkamah Tinggi membenarkan tuntutan-tuntutan PSKP dalam kedua-dua tindakan dan menolak tuntutan balas. Dalam rayuan ini terhadap keputusan tersebut, perayu berhujah, antara lain, bahawa perjanjian-perjanjian bukan perjanjian-perjanjian penyewaan simpliciter; bahawa bayaran bulanan sebanyak RM4,000 bukan sewa dan bahawa dengan itu Jelai tidak boleh

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didenda dengan bayaran sewa berganda di bawah s 28(4)(a) Akta Undang-Undang Sivil 1956 ('Akta'). A

Diputuskan:

(1) Adalah nyata bahawa perjanjian-perjanjian untuk hotel-hotel adalah perjanjian-perjanjian komposit menggabungkan pada satu bahagian, penyewaan hotel-hotel, dan pada satu bahagian lagi, peningkatan, pengekalan, pengurusan dan operasi hotel-hotel dibayar daripada sewa yang diterima daripada tetamu hotel. Bayaran bulanan RM4,000 kepada PSKP adalah sewa bulanan hotel-hotel yang tidak dapat dipersoalkan dan di bawah perjanjian-perjanjian ia bukan jumlah yang boleh ditahan terhadap mana-mana bayaran yang dituntut yang perlu dibayar oleh PSKP. Kegagalan untuk membayar sewa memberikan hak kepada PSKP untuk menamatkan perjanjian-perjanjian (lihat perenggan 15–17). B C D

(2) Kesimpulan bahawa bayaran bulanan adalah bayaran sewa dalam komponen penyewaan perjanjian-perjanjian, masing-masing membawa kepada kesimpulan yang tak dapat dielakkan bahawa penamatan perjanjian-perjanjian oleh PSKP adalah sah dan bahawa kegagalan Jelai untuk memberikan milikan kosong menyebabkan s 28(4)(a) Akta berbangkit memberikan hak kepada PSKP untuk menuntut sewa berganda untuk pemegangan lepas masa (lihat perenggan 18). E

(3) Memandangkan RM72,000 daripada jumlah keseluruhan tuntutan untuk sewa yang tidak dibayar jelas dihalang masa, jumlah tersebut dikurangkan daripada jumlah yang diawardkan oleh Mahkamah Tinggi. Rayuan terhadap penolakan tuntutan balas Jelai gagal kerana hujahan bahawa sewa ditahan untuk ditolak terhadap kos memperbaiki dan penyelenggaraan bukan hanya diplidkan tetapi bertentangan terma-terma perjanjian dengan masing-masing bahawa Jelai patut membayar kos pembaikan, penyelenggaraan, pengurusan dan operasi. PSKP hanya perlu membayar kos lebih daripada RM20,000 yang ia telah luluskan tetapi tidak terdapat keterangan untuk menunjukkan bahawa terdapat cadangan sedemikian yang dibuat, kelulusan diberikan dan tuntutan yang kemudiannya dibuat pada masa ianya terjadi, dan dikira sebagai ditolak terhadap sewa bulanan. Tuntutan balas berkaitan Rayuan No 2520 adalah dihalang masa (lihat perenggan 20 & 22–24).] F G H

Notes

For a case on evidence on factual matrix, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3908. I

Legislation referred to

Civil Law Act 1956 s 28(4)(a)
Limitation Act 1953 s 6(1)(a)

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Appeal from: Civil Suit Nos 22–133 of 2009 and 22–119 of 2009 (High Court, Kuantan)

Bastian Pius Vendargon (R Sarengapani with him) (RS Pani & Assoc) for the appellant.

Ong Siew Wan (Rosnah Faisal with him) (Rosnah Faisal & Assoc) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] In Civil Appeals C-02–2519–11 of 2013 and C-02–2520–11 of 2013, the defendant Jelai Holdings Sdn Bhd ('Jelai') appealed against the decision of the High Court in Kuantan in favour of the plaintiff Perbadanan Setiausaha Kerajaan Pahang ('PSK') in respect of the latter's properties as follows:

(a) C-02–2519–11 of 2013: Hotel in Fraser's Hill, Raub; and

(b) C-02–2520–11 of 2013: Hotel at Muara Beach, Balok.

[2] At the end of the hearing, we:

(a) in C-02–2519–11 of 2013, allowed the appeal in part to reduce the sum of RM321,000 to RM249,000 and dismissed the appeal on dismissal of the counterclaim, with costs agreed at RM5,000; and

(b) in C-02–2519–11 of 2013, dismissed the appeal with costs RM5,000.

BRIEF BACKGROUND

[3] In the case of the hotel in Fraser's Hill, PSK made its offer to Jelai on 23 April 1996 and Jelai accepted the offer on 25 April 1996. An agreement was signed on 3 February 1997 under which it was agreed that Jelai would upgrade, maintain, manage and operate the hotel for the consideration and under the terms and conditions set out in the respective agreements. It was agreed that rental would commence to be paid from 1 December 2000. PSK purported to terminate the agreement by way of a letter on 31 August 2008 and a legal notice dated 28 October 2009.

[4] In the case of the hotel in Muara Beach, Balok, the offer was made on 11 October 1994, accepted on 3 December 1995 with rental to begin from 1 December 1999. PSK purported to terminate the agreement by way of a letter on 8 January 2008 and a legal notice dated 2 September 2009.

[5] In each case, Jelai disputed the claim and filed a counterclaim under the respective agreements:

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(a) in respect of the hotel at Fraser's Hill, Jelai pleaded limitation for the monthly rental claimed from May 2002 to November 2003 and costs expended for, inter alia, improvements to the hotel for the periods 1996–2000 and 2001–2005; and

(b) in respect of the hotel at Muara Beach, Balok, for the periods 1995–1999, 2000–2005, costs expended for, inter alia, improvements to the hotel.

ISSUES

[6] The key issues raised for Jelai are as follows:

(a) Tenancy: The agreements in respect of both the hotels at Fraser's Hill and at Balok, are not tenancy agreements simpliciter, the payment of RM4,000 'yang kena dibayar kepada PSK pada 7 haribulan tiap-tiap bulan dan bayaran pertama dibuat pada ...' are not rental, and therefore the appellant Jelai is not a tenant holding over subject to double rental under s 28(4)(a) of the Civil Law Act 1956 (Act 67);

(b) Limitation: Since the claim in respect of the hotel at Fraser's Hill was filed only on 16 November 2009, rental for May 2002 to November 2003 is time barred under s 6(1)(a) of the Limitation Act 1953 (Act 254); and

(c) Counterclaim: The appellant Jelai is entitled to the payments in its counterclaim.

Tenancy

[7] The relevant agreements were entitled 'Perjanjian Pengendalian dan Penyelengaraan Hotel Kos Rendah ....'. The title does not suggest a tenancy.

[8] The recitals states, inter alia, that PSK agrees to Jelai to 'mengendali dan membangun mana-mana bahagian tanah tersebut dengan maksud memperlengkapkan lagi hotel tersebut dengan lebih baik'.

[9] Article 1.1 appointed Jelai 'untuk menjalankan kerja-kerja membangun, meningkat, mengurus dan menyelenggara hotel tersebut dan kemudahan-kemudahan Gang sedia ada di tanah tersebut (Kompleks tersebut)'.

[10] Article 1.2 provided for a term of 30 years for the agreement.

[11] A monthly payment of RM4,000 by Jelai to PSK is provided in article 1.3 as follows:

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A 1.3 Sebagai balasan daripada Perjanjian ini, JHSB akan membayar bayaran bulanan sebanyak RM4,000 (Ringgit Malaysia Empat ribu sahaja) yang kena dibayar kepada PSK pada (7) tujuh haribulan tiap-tiap bulan dan bayaran-pertama dibuat pada 1hb Disember 2000.

B **[12]** Article 2, as to obligations of Jelai, provided that Jelai was responsible for, inter alia:

(a) 'Meningkat, mengurus dan menyelenggara hotel tersebut serta kemudahan-kemudahan di kawasan Kompleks tersebut dengan kos
C sendiri ...' (article 2.1);

(b) 'Melengkapi dan menyediakan segala kemudahan Kompleks berkenaan disamping anggaran kos tidak lebih daripada RM1.4 juta seperti Lampiran B' (article 2.2);

D (c) 'Melaksanakan pembangunan dan peningkatan kepada Kompleks tersebut ...' (article 2.3);

(d) 'Mengubah atau membina semula mana-mana bahagian bangunan di dalam Kompleks tersebut ...' (article 2.4);

E (e) 'Menerima mengambilalih pada tarikh penyerahan/pengambilalihan operasi Kompleks tersebut dan seterusnya mengendalikan Kompleks berkenaan' (article 2.5);

(f) 'Mengurus, menyelenggara, membaiki serta mengganti baru apa-apa
F kerosakan atau kecacatan keatas mana-mana bangunan hotel tersebut, bangunan dan kemudahan-kemudahan yang sedia ada di Kompleks tersebut' (article 2.6);

(g) 'Mengembalikan dan menyerahkan secara percuma diakhir tempoh
G pengendalian ini ke semua bangunan dan kemudahan-kemudahan yang sedia ada di Kompleks tersebut' (article 2.7);

(h) 'Mengenakan kadar bayaran yang berpatutan (tertakluk kepada persetujuan PSK) keatas segala perkhidmatan yang diberi termasuklah penginapan, pengangkutan, makanan dan kemudahan-kemudahan lain
H yang berkaitan' (article 2.8); and

(i) 'Tidak membenarkan mana-mana pihak lain mengendalikan Kompleks tersebut tanpa kebenaran bertulis PSK' (article 2.13).

I **[13]** We compared the above with the obligations of PSK:

(a) 'Membenarkan dan membantu, dimana perlu kerja-kerja pembangunan dan peningkatan di Kompleks tersebut ...' (article 3.1);

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(b) 'Membenarkan pihak JHSB, ... hak memasukki dan mendudukki Kompleks tersebut bagi maksud menjalankan kerja-kerja membangun, meningkat, mengurus dan menyelenggara Kompleks tersebut' (article 3.2);

(c) 'Menyenaraikan dan seterusnya menyerahkan kepada JHSB, ... apa-apa bangunan, dan kelengkapannya' (article 3.3); and

(d) 'Memberikan kebenaran kepada JHSB ... menjalankan operasi dan mengenakan bayaran pada kadar yang berpatutan ke atas segala perkhidmatan yang disediakan' (article 3.3).

[14] We observe that although PSK is the owner and Jelai is appointed to upgrade, improve, repair, manage and operate the hotels, nowhere is it provided as to the fees payable to Jelai for the services provided by it. Nor is it required to account and pay to PSK or share with PSK the room rates received from guests staying in the hotels or the profits from the operations of the hotels. Sub-article 1.3 is the sole provision as to a monthly payment, and it provides that the manager and operator pays PSK a monthly payment of RM4,000.

[15] It is evident, in our view, that the respective agreements for the hotels are composite agreements combining upgrading, maintenance, management, operation on the one hand, paid for from the rentals received from hotel guests, and a tenancy of the hotel on the other. It is evident that the respective agreements for the hotels are composite agreements combining upgrading, maintenance, management, operation on the one hand, paid for from the rentals received from hotel guests, and a tenancy of the hotel on the other.

[16] In respect of this payment of RM4,000 per month, it is provided in article 9.12 that if Jelai did not, failed or refused to pay the amount set out in sub-article 1.3 for more that 21 days from the date it is due, then whether or not there is a demand from PSK, PSK may terminate the agreement and the services of Jelai subject to a 60-days' notice. This payment of RM4,000 per month is clearly a right PSK is entitled to receive strictly and regardless of the occupancy of hotel rooms, and is not conditioned as a sum which can be withheld against any payment that can be claimed and due from PSK.

[17] Rental is, in law, a payment that is essential to preserve the right of the owner as owner, in this case, to assert unequivocally that PSK is the owner of the respective land and the hotel built thereon, and that Jelai, though it upgrades, repairs, maintains, manages and operates the hotels, remains thereon as a tenant. The monthly payment to PSK of RM4,000 is, in our view, therefore unquestionably a monthly rental of the hotel premises.

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[18] The conclusion that the monthly payments of RM4,000 under the agreement are rental payments in a tenancy component of the respective agreement, leads inevitably to the conclusion that:

(a) the termination was lawful; and

(b) the failure by Jelai to deliver vacant possession results in the coming into operation of s 28(4)(a) of the Civil Law Act 1956 entitling PSK to claim double rental for holding over.

[19] The appeal on this issue, therefore, fails.

Limitation

[20] The claim for unpaid rental was filed on 6 November 2009. Part of the claim was for the period May 2002 to November 2003, which is clearly time barred. At RM4,000 per month for 18 months, this amounts to RM72,000. Accordingly this amount must be deducted from the claim for unpaid rental of RM321,000. We, therefore, allow this part of the appeal to reduce the sum due from RM321,000 to RM249,000.

Counterclaim

[21] This part of the appeal by Jelai relates to the dismissal of its claim.

[22] That the monthly rental of RM4,000 were held back to be set-off against costs of repair and maintenance was not only not pleaded in the defence but contradicts explicit the terms of the respective agreement that Jelai pays for costs of repairs, maintenance, management and operation. According to the respective agreement, PSK was to pay for costs above RM20,000 (see cl 2.1). This necessarily means that Jelai obtains the approval of PSK before such costs above RM20,000 are to be incurred. There was no evidence adduced that there was any such proposal made, approval given and subsequent claim made at the time they were incurred, and accounted for as a set-off against the monthly rentals.

[23] In the absence of such evidence, the counterclaim made on 30 May 2011 for costs payable by PSK is wholly without merit, and obviously an ill conceived afterthought. Commenced on 30 May 2011, the claim for the period 1995–1999 is clearly time barred. In the absence of evidence of accounts and claim submitted during the period 2000–2005, the argument that it is a running account does not stand scrutiny to prevent the claim for the period from being time barred.

[24] We, therefore, dismiss the appeal on the counterclaim.

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[25] Accordingly, we allowed the appeal only in part as set out in para [2] above and fixed costs at RM5,000 in each appeal. We ordered that the deposits for each appeal be refunded.

Order accordingly.

Reported by Ashok Kumar